State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Portsmouth NH Police Patrolmen's Union, NEPBA Local 11 Complainant v. Portsmouth Police Commission Respondent	*	Case No: P-0709-28 Decision No. 2007-140

APPEARANCES

Representing Portsmouth NH Police Patrolmen's Union, NEPBA Local 11:
Peter J. Perroni, Esq., Nolan & Perroni PLLC Lowell, Massachusetts

Representing Portsmouth Police Commission:
Thomas J. Flygare, Esq., Flygare, Schwarz & Closson, PLLC Exeter, NH

BACKGROUND

The Portsmouth NH Police Patrolmen's Union, NEPBA Local 11 ("Association") filed an unfair labor practice complaint against the Portsmouth Police Commission ("City") on March 30, 2007. The Union claims the City improperly required Officer Webb to remove a New England Police Benevolent Association ("NEPBA") pin from his uniform. The Association contends the display of the pin was proper and its removal was not justified or required and that the City has committed unfair labor practices in violation of RSA 273-A:5 I (a), (b), (c) and (g) and has violated Officer Webb's rights of free speech under the United States and New Hampshire constitutions.

As remedies, the Association requests that the PELRB: 1) Immediately issue a cease and desist order against the Respondent prohibiting the Respondent from ordering any patrol officer to remove his/her Association pin; 2) Order payment of costs, including attorney fees incurred by the Association; and 3) order any other relief the Board deems adequate and necessary.

On April 13, 2007, the City filed its answer denying the Association's charge. The City states that Officer Webb was required to remove his NEPBA pin consistent with Department Standard Operating Procedures. On May 1, 2007 the City filed a motion to dismiss, claiming dismissal is required because: 1) the complaint is barred by the 6 month limitation period set forth in RSA 273-A:6, VII; 2) the complaint lacks the specificity required by Pub 201.02 (b)(4) and (b)(6); and 3) the parties' collective bargaining agreement covers this dispute and provides for final and binding arbitration.

The City requests that the PELRB: 1) dismiss the charge with prejudice; (2) order the Association to reimburse the City for its fees, expenses, and lost time in responding to the Charge; and 3) grant such other relief as may be appropriate under the circumstances.

The undersigned Hearing Officer conducted a hearing on May 31, 2007 at the PELRB offices in Concord, New Hampshire. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The record was held open until July 30, 2007 to allow the parties to file briefs. Both parties have filed briefs, and the record is now closed. The parties' stipulations are contained in Findings of Fact 1 through 7, set forth below.

FINDINGS OF FACT

1. The Portsmouth Police Commission ("Commission") of the City of Portsmouth ("City") is a public employer within the meaning of RSA-A:1, X.

2. The Portsmouth NH Police Patrolmen's Union NEPBA Local 11 is the exclusive representative of all full-time police officers employed by the City.

3. The City and the Union are parties to a collective bargaining agreement ("CBA") with a commencement date of July 1, 2003 and an expiration date of June 30, 2008.

4. Officer Richard Webb is a patrolman with the Portsmouth Police Department and a Union Steward.

5. Officer Richard Brabazon is a patrolman with the Portsmouth Police Department and President of the Union.

6. On or about May 1, 2006, Officer Brabazon was asked by Captain Ferland to remove a 4-leaf clover and NEPBA pin from his uniform.

7. On or about October 3, 2006 Officer Webb was asked by Captain Ferland to remove the NEPBA pin from his uniform. Officer Webb complied with the order.

8. The department's standard operating procedure ("SOP") (City Exhibit C-2) addresses the display of pins on summer uniforms in part IV-A(2)(l) and provides as follows:

l. Team Designations and Other Pins: Team designations and merit award pins may only be worn upon approval of the Chief of Police. They are to be worn centered above the right pocket in an orderly arrangement starting just above the nametag. The approved team designations and merit award pins are as follows:

1. Accident Investigation Team
2. Emergency Rescue Team
3. Field Training Officer
4. Honor Guard
5. D.A.R.E. Instructor
6. Motorcycle Unit
7. K-9 Unit
8. Red Cross Life Saving Pin
9. Detective
10. PPD Memorial Pins (i.e. deceased officer's number)
11. Congressional Awards Pin
12. Any other law enforcement award pins as approved by the Chief of Police.

**No other designations or pins shall be worn on the uniform without the written approval of the Chief of Police.

9. The SOP concerning pins on winter uniforms is identical to the summer uniform rule.

10. City Exhibit C-4 contains an email dated May 3, 2006 which shows that on May 2, 2006 Chief Magnant was involved in a consultation with attorney Flygare about whether Association members are allowed by labor law to wear union pins on their uniforms. On May 3, 2006, after Chief Magnant had reviewed the issue with attorney Flygare, Deputy Chief DiSesa instructed Officer Brabazon to remove his NEPBA pin.

11. NEPBA pins are not on the approved list of pins contained in the City's SOP, City Exhibit C-2.

12. Chief Magnant has never given verbal or written approved of the display of NEPBA pins on uniforms, either in regard to Officer Brabazon or Officer Webb.

13. Officers have worn pins other than those on the approved pin list contained in the City's SOP. See Union Exhibits 2 through 5. There was insufficient evidence to determine whether all such pins were approved by the current or former Chief of Police.

14. Of the public employers listed on the survey documented in City Exhibit C-10, only the Hillsborough County Sheriff's Department and the Town of Salem have actually had issues arise concerning officer's wearing pins. The Hillsborough County Sheriff's Department situation involved concerns over officers wearing the Michael Briggs Memorial pin. The Town of Salem situation arose a number of years ago and involved a union pin which was ultimately allowed.

DECISION AND ORDER

JURISDICTION

The PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. See RSA 273-A:6, I. The PELRB does not have jurisdiction over the constitutional claims raised by the Association and accordingly those claims are dismissed.

DISCUSSION

The first issue is whether the complaint is untimely pursuant to RSA 273-A:6, VII. The complaint was filed within six months of the date when Captain Ferland asked Officer Webb to remove a NEPBA pin. However, it was not filed within six months of the date when Captain Ferland asked Officer Brabazon to remove a NEPBA pin. On its face, the current complaint is timely, as it was filed within six months of the date of the alleged violation. However, the City argues that the Association and Officer Brabazon's failure to file a grievance or an unfair labor practice within six months bars the Association from filing a complaint based upon the similar, but subsequent experience of Officer Webb.

The fact that the Association and Officer Brabazon failed to file an unfair labor practice complaint means that the Association and Officer Brabazon relinquished the right to bring an unfair labor practice complaint based upon the City's treatment of Officer Brabazon in May, 2006. However, the statute does not bar the filing of any future and similar claims which might arise, such as the one presented in this case. Therefore, Officer Webb's claim is not untimely.

The City also claims this matter is a disciplinary action and is subject to final and binding arbitration pursuant to the parties' collective bargaining agreement. However, the issue in this case is whether Officer Webb has a statutory right under RSA 273-A to wear a NEPBA pin and, if so, whether the City has improperly interfered with this statutory right in violation of RSA 273-A:5, I (a), (b), (c) and (g). These issues are controlled by the provisions of RSA 273-A, and not by the parties' collective bargaining agreement. Nothing in the parties' collective bargaining agreement shows that the parties intended to resolve these statutory claims through the grievance and ultimately arbitration process. The arbitration clause does not include this particular issue because I find, with positive assurance, that the CBA is not susceptible of an interpretation that covers the dispute. *Appeal of Town of Bedford,* 142 N.H. 637, 640 (1998).

The City also argues that Officer Webb's complaint is premature because it is an appeal of Captain Ferland's order and Officer Webb failed to challenge or question Captain Ferland's order with Chief Magnant. However, the pending matter is not an appeal of Captain Ferland's order, but a complaint alleging that on account of Captain Ferland's actions the City violated

specific provisions of RSA 273-A:5, I. There is nothing in the parties' collective bargaining agreement or in the statute which required formal action by Chief Magnant as a condition precedent to the filing of the complaint.

Further, even if action by Chief Magnant were a condition precedent to the filing of the complaint, dismissal is not justified. Chief Magnant had the opportunity to reverse Captain Ferland's order once he became aware of it, to disagree with it during his testimony at hearing, or to reverse it via the pre-hearing proceedings in this case, one purpose of which is to foster and provide the parties with the opportunity to come to an agreed upon resolution of complaints. See Pub 202.01 9(d). Chief Magnant did not do so. I find for purposes of this proceeding that Chief Magnant agreed with Captain Ferland's decision and he had no interest in or intention of reversing Captain Ferland's decision. The Chief had ample opportunity to document a contrary position if he desired. *See also* City Exhibit C-4.

The next issue is whether Officer Webb in fact has a statutory right to wear a NEPBA pin. Because neither RSA 273-A, prior PELRB decisions, nor New Hampshire Supreme Court decisions specifically address the question, both parties rely on other authorities to support their argument. I find the analysis contained in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)(involving the National Labor Relations Act or "NLRA"); *Sheriff of Worcester County vs. Labor Relations Comm.* 60 Mass. App. Ct 632 (2004)(involving the Massachusetts Public Employee Collective Bargaining Law or "MPECBL"); *U.S. Department of Justice, Immigration and Naturalization Service v. Federal Labor Relations Authority,* 955 F.2d 998 (1992)(involving the Federal Service-Labor Management Relations Statute or "FSLMRA"); and *Immigration & Naturalization Service v. Federal Labor Relations Authority*, 855 F.2d 1454 (9th Cir. 1988)(involving the FSLMRA) to be particularly instructive.

As is evident from these decisions, the NLRA, the FSLMRA, and the MPECBL have all been interpreted to give employees a statutory right to wear union insignia. The City argues that because RSA 273-A does not have express statutory language like that relied upon in the referenced decisions those cases have limited application to this case. I reject this argument because I find that New Hampshire public employees also enjoy the basic and fundamental rights that are expressly outlined in these other labor statutes and which are at the core of the right to organize and engage in collective bargaining. Under Massachusetts law, public employees have:

> The right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively...and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion.

Sheriff of Worcester County vs. Labor Relations Comm. 60 Mass. App. Ct. 632, 640-642 (2004)(citing G.L. c. 150E, §2). With respect to private sector employees, federal law states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

> own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Immigration & Naturalization Service v. Federal Labor Relations Authority, 855 F.2d 1454, 1459 (9th Cir. 1988)(citing Section 7 of the NLRA, 29 U.S.C.§158(a)(1)). Federal public sector employees have similar rights:

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

Immigration & Naturalization Service v. Federal Labor Relations Authority, 855 F.2d at 1458 (citing the FSLMRA, 5 U.S.C. §7102).

The absence of substantially identical language in RSA 273-A is not fatal to the Association's claim. Most, if not all, of the express rights of employees recognized under the excerpted provisions of the NLRA, the FSLMRA, and the MPECBL are enjoyed by New Hampshire public employees by virtue of the overall scheme, purpose, and language of RSA 273-A. RSA 273-A recognizes the right of public employees to organize and to be represented for the purpose of collective bargaining. The provisions of RSA 273-A:5, I (a), (b), (c), and (d) provide, in part, protections to employees who engage in union related activities. This board has noted that RSA 273-A:5, I (a), (b), and (c) "basically protect employees in their exercise of rights associated with 'concerted activity' relating to organizational activities, union administration and discrimination in hiring and employment practices." *United Professional Bus Drivers of Concord, UAW v. Concord School District*, PELRB Decision No. 2000-060. *See also Carolyn Bailey/Milton Education Association, NEA-New Hampshire*, PELRB Decision No. 94-106 (teachers' pre-school work to rule meeting/demonstration a protected union activity). The protection of union activity is also recognized in *Appeal of Professional Firefighters of East Derry*, 138 N.H. 142 (1993). In *Professional Firefighters of East Derry*, the court adopted the federal standard for deciding whether an employer's actions were improperly motivated by a desire to retaliate against an employee because of union activity:

> [T]o establish an unfair labor practice under federal law, the union must prove by a *preponderance of the evidence* that the discharge or elimination was motivated by a desire to frustrate union activity.

Id. at 144-145 (emphasis in original)(citations omitted).

It is not a novel conclusion that there is a variety of statutorily protected "union activity" under RSA 273-A, even though the statute does not contain the same time of descriptive list that appears in the NLRA, the FSLMRA, or the MPECBL. It is apparent that the kinds of union activity protected under RSA 273-A are similar to the kinds that are protected under the NLRA, the FSLMRA, and the MPECBL. It would be hard to reasonably justify and defend the conclusion that RSA 273-A does not grant to public employees in New Hampshire the right to engage in substantially the same kinds of union related activity that is stated in the cited provisions of the NLRA, the FSLMRA, and the MPECBL. Accordingly, New Hampshire public employees have the right under RSA 273-A to organize, to form, join or assist labor organizations, to bargain collectively, and to engage in non-prohibited concerted activities for the purpose of collective bargaining. It is widely accepted that public and private employees who enjoy these rights also enjoy the right to wear union insignia such as a NEPBA pin.[1] There is no legitimate reason to come to a different conclusion in this case.

However, Officer Webb's statutory right to wear a NEPBA pin is not absolute; it can be restricted in "special circumstances." Under the special circumstances test, "the employee has the right to wear a union pin on his uniform absent special circumstances." *U.S. Department of Justice, Immigration and Naturalization Service,* 955 F.2d at 1004. The factors to consider include "the circumstances in which the insignia is worn, the physical appearance of the insignia, the nature of the employer's activity and the employer's need for production, safety and discipline." *Id.* A para-military law enforcement unit has "many of the same interests as the military in regulating its employees' uniforms...[and] when a law enforcement agency enforces an anti-adornment/uniform policy in a consistent and nondiscriminatory manner, a special circumstance exists, as a matter of law, which justifies the banning of union buttons." *Id. See also Sheriff of Worcester County vs. Labor Relations Commission,* 60 Mass. App. Ct. 632, 642-643.

In this case, the City does not have a comprehensive ban on all adornment to a standard and required uniform, as is evidenced by the list of approved but not required non-standard uniform pins described in City Exhibit C-2. Further, the approved list of non-standard and non-required uniform adornments can be expanded at the discretion of the Chief. The City's uniform policy thus allows for variation in the uniform of its police officers. There was also evidence that officers have worn other, non-union, pins which are not shown on City Exhibit C-2 and which may or may not have been formally approved by the current or former Chief.

The lack of a comprehensive and neutral uniform anti-adornment policy and the evidence in this case persuade me that there are no special circumstances which justify a restriction on Officer Webb's right to wear a NEPBA pin. I reach this conclusion after due consideration of the specific character of the NEPBA pin submitted into evidence in this case and the likely impact of its display on a City police officer's uniform. There was insufficient evidence that this particular pin, or others that are substantially identically in content, size, and appearance, interfere with or impair an officer's job performance or otherwise negatively impact an officer's allegiance to the department. Belonging to and supporting NEPBA and fulfilling

[1] As noted in *U.S. Department of Justice, Immigration and Naturalization Service,* 955 F.2d 998 (1992), and as is evident by a reading of *Republic Aviation,* the United States Supreme Court did not "hold expressly that the right to wear a union button arose only from the right 'to engage in other concerted activities in section 7." Id at 1002.

one's duties as a Portsmouth police officer in a loyal and proper manner are not mutually exclusive activities.

Further, there was insufficient evidence that the display of pins of this type and nature would: 1) undermine an officer's authority when dealing with the public; 2) cause confusion or misapprehension amongst the public as to the source and sponsor of an officer's law enforcement authority; 3) interfere with the City's need for production, safety and discipline any more than the already existing circumstance of an officer's association with or membership in NEPBA.

Accordingly, the Association's complaint is sustained as the Association has established a violation of RSA 273-A:5, I (a). The City is prohibited from ordering Association members to remove NEPBA pins from their uniforms provided the pin is substantially identical in size, content and appearance to the NEPBA pin submitted into evidence in this case. This order does not mean that the City will be precluded from banning NEPBA pins in the future if the City adopts a comprehensive and neutral anti-adornment uniform policy consistent with the standards discussed in this decision.

So ordered.

October 4, 2007.

Douglas L. Ingersoll, Esq.
Hearing Officer

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